Neutral Citation Number: [2023] EWHC 1331 (Ch)

Case No: BL-2019-001329

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 June 2023

Before :

MASTER BRIGHTWELL

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Between :

(1) NORTHERN POWERHOUSE DEVELOPMENTS LIMITED **(2) WOODHOUSE FAMILY LIMITED** **(3) LBHS MANAGEMENT LIMITED** **(4) FOURCROFT HOTEL (TENBY) LIMITED** **(all in liquidation by their joint liquidators, Robert Armstrong and Andrew Knowles)**	**Claimants**
- and -	
GAVIN LEE WOODHOUSE	**Defendant**

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Paul O'Doherty (instructed by **Hewlett Swanson**) for the **Claimants**
Max Cole (instructed by **Preiskel & Co LLP**) for the **Defendant**

Hearing date: 25 May 2023

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Approved Judgment

Master Brightwell:

1. In this application, the claimants seek an order that, unless the defendant do pay the costs of £59,258.30 due under an order of Ms Caroline Shea QC, sitting as a Deputy High Court Judge (the "Deputy Judge"), dated 21 June 2022, his defence be struck out and judgment entered for the claimants in the (total) sum of some £5.2 million plus interest.

2. In her ex tempore judgment ([2022] EWHC 3462 (Ch)), the Deputy Judge summarised the proceedings in this way:

> '2 To set out the background, the claim is brought by both claimants against the defendant in respect of alleged breaches of director's duties. The defendant is the sole director of both claimant companies and both claimant companies are in administration and controlled by and act by the joint administrators.
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> 3 The defendant is the ultimate beneficial owner of a group of associated companies known as the Northern Powerhouse Developments Group ("the NPD Group"). The NPD Group was in the business of promoting and operating real estate investment schemes involving hotels and care homes, both off plan and in existing properties and businesses. It is the claimants' allegation that the NPD Group sold investments in a number of properties in which the NPD Group itself had no interest, and that £80 million was received by the NPD Group from investors into the various schemes, and that those investors are, almost without exception, insolvent.
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> 4 The claimants' claim is that the defendant is liable for wide-ranging mismanagement, dishonesty, and negligence, together with breach of statutory, common law and equitable duties. In respect of those breaches, the claimants seek personal and proprietary remedies against the defendant. Save for one group of allegations which I refer to below, neither the details nor the merits of the claims concern us in this application, and I should say at this point that I was not provided with, and nor do I think I needed to see, the pleadings in the case. I had sufficient materials in the orders that have been made and in the parties' skeleton arguments.
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> 5 The particular aspects that may be relevant to the issues for determination are the claims that the defendant: misappropriated the claimants' money for personal gain, running up substantial director's loans with, it is said, no justification or foundation; caused the first claimant to purchase shares personally owned by him in one of the NPD Group companies at an inflated value; and further procured a transfer of

> more than £3 million from the first claimant to other companies of which the defendant is the sole beneficial owner, that transfer being for no consideration and for purposes unconnected with the legitimate business of the first claimant.
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> 6 In issue between the parties is liability for breach of duty and quantum. Broadly speaking, the defendant denies the allegations of mismanagement, dishonesty and negligence. The defendant does accept liability to repay the director's loans, subject to proper demand being made and with no admission of any breach of director's duty or impropriety. The defendant seeks sight of the books and records of the first claimant before responding to the claim relating to the transfer of the £3 million from the first claimant.
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> 7 The first claimant applied for administration orders and freezing injunctions in respect of a number of parties within or related to the NPD Group and in respect of a related group of companies also run by the defendant known as the NBI Group. The *ex parte* application was heard and granted on 12 July 2019, and the order made was subsequently varied on 15 July 2019. On 18 September 2019, the freezing injunction which I am referring to as the Smith Order was made by Marcus Smith J, replacing the varied original *ex parte* order, but replicating many of its provisions. The defendant was not present or represented at the 18 September 2019 hearing, but has, since that hearing, made no application to vary or discharge the Smith Order and has not since, and does not in defending this application, seek to challenge it or otherwise argue that he is not bound by it.'

3. The costs orders made by the Deputy Judge were made after judgment had been given in favour of the claimants upon an application by them for an order that the defendant do provide further information pursuant to the Asset Disclosure Order made as part of the freezing injunction, and further orders to give effect to the paragraph 10 of the freezing injunction order. Paragraph 10 (the "Spending Order") permitted the defendant to spend £1,000 per week towards his ordinary living expenses and a reasonable sum on legal advice and representation, but before spending any money required him to tell the claimants' legal representatives where the money was to come from.

4. At the conclusion of her judgment, the Deputy Judge determined that the payment on account of the costs ordered by Marcus Smith J to be payable by the defendant on the indemnity basis should be £46,518.97, and the costs of the application before her were summarily assessed at £12,740, both sums to be paid within 28 days. It was following the failure of the defendant to pay those sums that the present application was issued.

The legal principles

5. The jurisdiction of the court to make an unless order striking out a statement of case in the event that a party to proceedings does not comply with an order for costs previously made is clearly established. The relevant principles were set out by Sir Richard Field in *Michael Wilson & Partners Ltd v Sinclair* [2017] EWHC 2424 (QB), when he said at [29], by reference to earlier authority:

> '29 In my judgment, the following principles are applicable when dealing with an application that a party to ongoing litigation should be debarred from continuing to participate in the litigation by reason of having failed to pay an order for costs made in the course of the proceedings:
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> (1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the court's inherent jurisdiction.
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> (2) The Court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
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> (3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.
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> (4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.
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> (5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.

> (6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order.'

6. The key question which must be asked on an application such as this is whether the respondent cannot pay or will not pay. As Chadwick LJ said in *Crystal Decisions (UK) Ltd v Vedatech Corp* [2008] EWCA Civ 848, with reference to comment of the judge in the court below:

> '18. …. He said this, at paragraph [16] of his judgment:
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> "In any event I take the view that orders of the court, even in relation to interim costs, require to be complied with and that, unless there is some overwhelming consideration falling within Article 6 that compels the court to take a different view, the normal consequence of a failure to comply with such an order, is that the court, in order to protect its own procedure, should make compliance with that order a condition of the party in question being able to continue with the litigation."
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> For my part, I would hold that – whether or not a statement in such general terms can be supported – the proposition can be supported in a case (such as the present) where there is no other effective way of ensuring that the interim costs order is satisfied. That, of course, is always subject to what the judge referred to as the overwhelming consideration falling within Article 6: that orders requiring payment of costs as a condition of proceeding with litigation are not made in circumstances where to enforce such an order would drive a party from access to justice. But, for the reasons that the judge explained and to which I have already referred, this was not such a case.'

7. In *Goldtrail Travel Ltd (in liq.) v Onur Air Taşimacilik AŞ* [2017] 1 WLR 3014, the Supreme Court considered the principles to apply where it is contended that an order sought may stifle the respondent's continued participation in the proceedings. The issue there was whether this would be the effect of an order requiring an appellant to pay the judgment debt into court as a condition of pursuing an appeal. The parties accept that these principles apply to the present application. Lord Wilson JSC summarised the relevant test in this way:

> '15 There is no doubt—indeed it is agreed—that, if the proposed condition is otherwise appropriate, the objection that it would stifle the continuation of the appeal represents a contention which needs to be established by the appellant and indeed, although it is hypothetical, to be established on the balance of probabilities: for the respondent to the

> appeal can hardly be expected to establish matters relating to the reality of the appellant's financial situation of which he probably knows little.
>
> 16 But, for all practical purposes, courts can proceed on the basis that, were it to be established that it would probably stifle the appeal, the condition should not be imposed.
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> 17 It is clear that, even when the appellant appears to have no realisable assets of its own with which to satisfy it, a condition for payment will not stifle its appeal if it can raise the required sum. As Brandon LJ said in the Court of Appeal in the *Yorke Motors* case (unreported) 5 June 1981, cited with approval by Lord Diplock [1982] 1 WLR 444, 449: "The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need."'

8. On the approach to the question, also key in the present application, of whether the respondent is able to raise the funds to meet an order despite impecuniosity Lord Wilson said the following, after stating that there is no criterion of exceptional circumstances, there concerned with the position where the respondent to the application was a limited company:

> '23 …. In this context the criterion is: "Has the appellant company established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition?"
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> 24 The criterion is simple. Its application is likely to be far from simple. The considerable forensic disadvantage suffered by an appellant which is required, as a condition of the appeal, to pay the judgment sum (or even just part of it) into court is likely to lead the company to dispute its imposition tooth and nail. The company may even have resolved that, were the condition to be imposed, it would, even if able to satisfy it, prefer to breach it and to suffer the dismissal of the appeal than to satisfy it and to continue the appeal. In cases, therefore, in which the respondent to the appeal suggests that the necessary funds would be made available to the company by, say, its owner, the court can expect to receive an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company's financial position; and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms.'

9. In *MV Yorke Motors v Edwards*, Lord Diplock also said this at 449:

> 'My Lords, in the Court of Appeal, it was conceded by counsel for Mr Yorke, and Brandon LJ in his judgment accepted the concession as correct, that if the sum ordered to be paid as a condition of granting leave to defend is one which the defendant would never be able to pay, then that would be a wrongful exercise of discretion, because it would be tantamount to giving judgment for the plaintiff notwithstanding the court's opinion that there was an issue or question in dispute which ought to be tried. The same concession was repeated in the respondent's written case, which contained the following submissions as to the proper limitations upon its applicability:
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> "(i) Where a defendant seeks to avoid or limit a financial condition by reason of his own impecuniosity the onus is upon the defendant to put sufficient and proper evidence before the court. He should make full and frank disclosure. (ii) It is not sufficient for a legally aided defendant to rely on there being a legal aid certificate. A legally aided defendant with a nil contribution may be able to pay or raise substantial sums. (iii) A defendant cannot complain because a financial condition is difficult for him to fulfil. He can complain only when a financial condition is imposed which it is impossible for him to fulfil and that impossibility was known or should have been known to the court by reason of the evidence placed before it."
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> I see no reason to dissent from those submissions….'

10. The dispute between the parties in the present case is perhaps narrower than they have acknowledged. It is Mr Woodhouse's case that he cannot pay the costs order himself or raise the funds to do so. It is no part of his case that, even if I find that the evidence does not establish that the unless order would probably stifle his defence, I should as a matter of discretion decline to make an order in any event. By contrast, it is the claimants' position that Mr Woodhouse has not established on the balance of probabilities that an unless order would stifle the defence. It is not their case that, even if Mr Woodhouse has established that he cannot pay or raise the funds to pay the costs order, I would be justified in making an unless order.

11. Whilst the authorities make clear that the imposition of a condition of payment of a sum previously ordered to be paid in order to continue to participate in proceedings is an exercise of discretion, Lord Diplock said in *MV Yorke Motors* that, if the respondent would never be able to pay it, the imposition of the condition would necessarily be a wrongful exercise of that discretion. I agree with Mr Cole that a finding that the defendant has not satisfied the court

of the impossibility of complying with a proposed condition is a 'gateway' to the exercise of the discretion as explained in the *Michael Wilson* case.

12. In particular, the question whether the defendant has established that he cannot pay falls to be considered now. The Deputy Judge said that she was unable to take his alleged impecuniosity into account when the costs order was made as the defendant had at that stage filed no evidence of his means. I would also note that, whilst established inability to pay is a factor to be taken into account when considering whether to make an order for payment on account of costs, it is not a bar to an order in the way that it is when considering the imposition of a condition which might stifle the defence to a claim.

The application

13. The application was first listed to be heard together with a costs case management conference on 26 January 2023. The defendant filed a witness statement the day before that hearing, seeking an adjournment of the application, which was granted by Deputy Master Teverson subject to conditions as to the filing of evidence.

14. The defendant's substantive response to the application is found in his second witness statement dated 9 February 2023 ("Woodhouse 2"). The statement is detailed, but his position is summarised by the statement that, 'I do not have the means to pay the costs orders'. The witness statement attaches a table of assets, bank statements (and an explanation that certain statements were not currently available to him), details of his credit cards and other assets; and a discussion about litigation funding and attempts to raise funds secured against the property known as Barkisland Hall, Stainland Road, Halifax, to both of which I will return below. The defendant's evidence is that he lives rent free in a property owned by a friend, has no job or regular income stream, and his daily expenses are paid by his girlfriend.

15. In response, the claimants rely on the third witness statement of their solicitor, Ms Zoe May, dated 23 February 2023 ("May 3"). This statement provides a detailed commentary on each element of Woodhouse 2, with a large number of cross-references. There is a complaint that the information provided by the defendant is incomplete and, in particular, discussion on the questions of third-party funding and Barkisland Hall.

16. The defendant then filed a further witness statement on 22 May 2023, two days before the hearing ("Woodhouse 3"). The claimants were understandably critical of the timing of this statement, responding to May 3. I had some discussion with the parties on that day, in view of my concern on receipt of a bundle of 2,711 pages (not including Woodhouse 3 or its exhibits) that the half-day hearing listed may have been inadequate. I then indicated

that the hearing should proceed, with the entire hearing time to be available for submissions and judgment to be given on a later date. I also indicated a provisional view that (apart from the provision of earlier missing bank statements) Woodhouse 3 was comprised largely of argument and submissions, and that any objections that the claimants wished to pursue regarding the admission of evidence of facts stated in that document should be made by reference to individual assertions (i.e. rather than having argument on whether the document as a whole should be admitted or excluded). Mr O'Doherty for the claimants did not object to the admission of the document at the hearing, and referred to certain parts of it (especially in relation to funding) in support of the claimants' application. Indeed, it was his submission that Woodhouse 3 was diversionary and did not go to the crucial issues on the application.

The claimants' position

17. The background against which this application is heard, and as Mr O'Doherty stressed, is that there has been a series of breaches of court orders by the defendant. The most significant of these are breaches of the Asset Disclosure and Spending Orders. Referring to a schedule which had been produced in June 2021, the Deputy Judge held at [41] as follows, despite the defendant's position that he was not in breach of the Spending Order:

> '41 I fully accept that the defendant is in wholesale breach of his obligations under the Spending Order. I do not accept the submission that the schedule provided under cover of letter of 30 June 2021 complies with the requirements of the Spending Order; rather, it is in the nature of an attempt at a retrospective remedying of accumulated breaches up to that point. Contrary to the express requirements of the Spending Order, the defendant had not, before spending the sums of money recorded in that schedule, told the claimants' legal representatives where the money was to come from and self-evidently telling the claimants' solicitors about expenditure and its source after that expenditure had taken place cannot be performance of the obligation. I note that those breaches are implicitly acknowledged in the covering letter of 30 June 2021, not least by the statement I quoted above that the defendant understood that he must going forwards inform the claimants' solicitors where the money is to come from. That was expressly acknowledged in the letter of 30 June 2021 as something that had to be done and it was expressly assured in that letter that the defendant was going to do it. Again, I make the assumption, and have not been told otherwise, that that letter was written on instructions. The defendant has wholly failed to abide by that assurance, and wholly failed, more importantly, to comply with the Spending Order.'

18. Furthermore, after the defendant had sworn an affidavit on 7 October 2019 setting out his assets, it came to the notice of the claimants that he had a shareholding in a company called Stada Media, which had not been identified in the affidavit. The Deputy Judge considered this to be at the very least possibly a breach of the Asset Disclosure Order. She also did not consider that the defendant had provided evidence to support his assertion that the company had no value, and accordingly ordered the defendant to provide further details about that shareholding and to state whether there existed any further assets exceeding £1,000 not previously disclosed anywhere in the world.

19. The claimants point out that the defendant has also breached a number of procedural orders, including a failure to serve an amended defence by 16 September 2022 as ordered, and a failure to co-operate in accordance with the terms of Practice Direction 57AD in relation to Extended Disclosure. Hearings have also been postponed due to the defendant's requests for adjournments. Mr O'Doherty referred particularly to the delay in serving Woodhouse 3, especially when it had been trailed in correspondence several weeks earlier. On these points, Mr Cole referred to the difficulties which have been experienced by the defendant in finding funds to instruct his solicitors to complete the various steps in the litigation which have been required to be completed.

20. Mr O'Doherty summarised the claimants' position in three points, based on the defendant's failure previously in these proceedings to give full disclosure and his conduct of the litigation more generally. First, he submitted that the defendant had not established (as discussed by Lord Wilson in *Goldtrail*) that he is unable to obtain funding from third parties. Secondly, it cannot be accepted that the defendant cannot realise any funds from Barkisland Hall – he has intimated an application to vary the freezing injunction to do so, but has not pursued it. Thirdly, he has in all the circumstances fallen well short of showing impecuniosity.

21. I will take these points in reverse order although I realise that there is some overlap between, particularly, the first and third points.

Impecuniosity

22. The table of assets exhibited to Woodhouse 2, and which appears to represent information previously provided to the claimants, does not show any assets which appear to have any significant realisable value. Mr O'Doherty did not take me to any documentary evidence in order to support the argument that the defendant had undisclosed assets available to him. The argument that the defendant's evidence lacks credibility is an inferential one.

23. During the hearing, I clarified precisely how Mr O'Doherty was putting the claimants' case in this regard. He accepted that it was not open to me to make a finding that the defendant was hiding assets and, also, that no court had within these (or linked insolvency) proceedings found the defendant to have lied although there had been significant criticism of his conduct. It was also accepted that a party does not lose the protection of Article 6 ECHR if he has breached orders; the court takes these rights into account when imposing sanctions, including when making unless orders for the payment of previously imposed costs orders. Mr O'Doherty asked me instead to make an assessment of the credibility of the defendant's evidence taking into account all of his breaches.

24. As far as complaints about the substance of the defendant's witness statements are concerned, the claimants rely on the continuing failure to provide certain Nationwide and Halifax bank statements, which Woodhouse 3 explains he is still waiting for despite visiting the banks in person to request them. It is also pointed out that Woodhouse 2 was incorrect in saying that a Halifax current account (ending -862) had not been used since 2019; the claimants ascertained this error on reviewing the statements exhibited to Woodhouse 2.

25. In light of these points, it is submitted on behalf of the claimants that the court cannot be satisfied that a finding that the defendant is impecunious would be safe because the court does not have all the evidence and that is because the defendant has not provided it.

26. Despite Mr O'Doherty's attractively presented argument, I disagree. I consider that he is, on analysis, seeking to persuade me to find that the defendant is hiding or failing to disclose assets. A submission that I should find the evidence to be incredible because of prior breaches ultimately amounts to the same thing. Any breach of the terms of a freezing injunction, unless perhaps of a de minimis nature, is a serious matter and the Deputy Judge expressed the view in June 2022 that the defendant had likely been in breach of the Asset Disclosure Order by virtue of his non-disclosure of a shareholding. But, the level of disclosure given by the defendant is significant and the specific matters relied on to suggest that the disclosure given now is inadequate are limited to lack of some bank statements, an explanation having been provided why they are not available, and the mistaken statement as to whether one account had been used since 2019, which mistake was readily identified by disclosure of its statements.

27. The question for the court, as expressed by Lord Wilson in *Goldtrail*, is whether an unless order would probably stifle the defence. The defendant's evidence prima facie establishes that he is presently impecunious and the claimants' observations do not lead me, on a balance of probabilities, to the

conclusion that the defendant has assets available to him from which he is able to meet the costs order.

28. I should also say that May 3 trailed an argument that the defendant had put himself in a position where he could not pay the costs order by an excessive level of spending. Mr O'Doherty did not pursue this point in his written or oral submissions, the defendant's position being that any such spending occurred before the order for a payment on account of costs was made in June 2022.

Property assets

29. The defendant explains in Woodhouse 2 that he has sought the permission of the claimants to raise funds against the security of Barkisland Hall, a property which he claims to own beneficially jointly with his ex-wife. He obtained in 2022 an offer from a lender for that purpose. The claimants' position in the proceedings is that Barkisland Hall is held on a resulting trust for the claimants such that Mr Woodhouse has no beneficial interest in it. Nonetheless, the claimants did for a time engage in correspondence with the defendant on his request to release funds in order for him to pay for legal representation in these proceedings. No agreement was reached and the defendant would accordingly need to apply to vary the freezing injunction in order to release funds from the property. Mr O'Doherty relies on the failure of the defendant to make any such application, saying that the court cannot rely on his assertion of impecuniosity in those circumstances.

30. I will deal with this point shortly. I do not consider that it is open to the claimants both to contend that Barkisland Hall belongs to them and that they will thus not consent to it being used as a security for an advance to the defendant, and to contend in the same breath that I should find that he is not impecunious because he asserts that the property is owned in part by him. The illogicality in this submission is self-evident. The defendant has explained why the property has not been available to be used as a source of funds, and it is obvious to me that the property is not so available. It would of course be open to the claimants to apply for a charging order over the defendant's beneficial interest in the property, without prejudice to their contention in these proceedings that he does not have any such interest.

31. The claimants also rely on the fact that the defendant appears to have failed to pay the mortgage instalments on another property owned by him, known as the Friendly Inn, Boothtown Road, Halifax, and that he appears to have used the rent from this property to pay his living expenses. The claimants say that the property has been repossessed as a result and that if the defendant had complied with the Spending Order, they would have been aware of the non-payment of rent and could have taken steps to avoid repossession. That may

all be so, but it does not show that the defendant currently has assets available to him to meet the costs order; indeed, it points to the opposite conclusion.

The position on funding

32. The defendant has produced, and the claimants have commented upon, a table showing the litigation funding received by him since January 2020.

33. The claimants again submit that the defendant has not provided a full picture of how he might raise money. They submit that he has been represented for most of the period the litigation has been ongoing and has raised at least £96,500 according to his evidence, which he has chosen to use to pay for his own representation rather than to pay the costs order. It is said that it is inequitable for the court to allow this.

34. The criticisms of the defendant's evidence relate primarily to the evidence concerning the most recent two loan advances, of £15,000 in June 2022 and £16,000 in January 2023. These sums were (said to be) lent by a Mr Matthew McPhillips, although the money was paid over by a company, MavenIQ Ltd, a company for which the defendant works as a consultant from time to time, and receives commission payments. The defendant mentioned in Woodhouse 2 that he received such payments, but did not say that they were from that company. Furthermore, the defendant appears to call himself Gavin Lee, and not Gavin Woodhouse, when working as a consultant, and had not disclosed this fact. With regard to the second payment in January 2023, the claimants comment that Mr McPhillips had resigned as a director of the company in November 2022. The company also now appears from its most recent filed accounts to have no assets and to be about to be struck off.

35. The claimants are also critical of the defendant's failure to respond to points made in May 3 about payments made in 2020 between the defendant and companies called Gramra Limited and Blackbox Engineering Ltd, of which it is said that Mr McPhillips is a director, as is Mr Andrew Foreman, a friend from whom the defendant states that he has borrowed a car. Likewise, May 3 refers to payments made between the defendant and a company called Enco Ltd, of which Mr Jamie Moody, whose partner appears to own the property in which the defendant is currently living, is a director.

36. In respect of the defendant's ability to raise funds from third parties, paragraph 38 of Woodhouse 2 says this:

> 'I cannot ask my friends and family for money to pay the costs orders. They supported me financially for some three and a half years in the hope that I will be able to agree a settlement with the Claimants. They have loaned me large sums of money. Understandably, these people do not

> have unlimited financial resources and they can see that I am being prevented from defending myself. I know that if I was to ask them for money to pay the costs orders, they will refuse because they do not have further substantial sums of money to give me. Even if they had the money, they would not give it to me to pay the costs orders but to pay for legal bills.'

37. Mr O'Doherty submits that the inference to be drawn from this statement is that the defendant has not actually asked these people and is merely speculating. The claimants rely on all of these matters in support of the submission that the defendant has not provided full and frank disclosure of his ability to raise funds from third party business associates.

38. The evidence put forward by the defendant must be assessed and a view taken on whether he has established that he is unable to raise the funds to pay the costs orders, such that the imposition of an unless order would stifle his defence.

39. On that key question, I have come to the conclusion that the defendant has established this. There are curiosities in the way in which payments have been routed to him from MavenIQ Ltd but, standing back, what the claimants' points show is the fact that there are a number of individuals to whom the defendant has been able to turn for financial support to date. That is apparent from his statement of the loans he has received, and also of the support in daily living expenses that he continues to receive. The points about connections with companies other than MavenIQ Ltd highlight this factor, and do not in themselves suggest other sources of funding are available. The fact that the loans from Mr McPhillips were paid through a company that appears now to have no assets is something for which its directors may have to account, but the defendant is not a director of that company. It is not obvious to me that disclosure of why the company acted in this way is disclosure that the defendant is able to give. The fact that he seems to have acted as a consultant under a different name without explanation has given me some pause for thought, but it is not evidence of the availability of funding or, necessarily, or the failure to give full and frank disclosure about sources of funding.

40. I consider that it is also instructive to consider the funding which has been received by the defendant to date, the amounts of which do not appear to be disputed by the claimants. Only the sum of £16,000 has been received since the costs order was made. I do not consider that the defendant has simply chosen to pay for his own legal representation instead of paying the costs order. But, in any event, I do not read the authorities as suggesting that a defendant must always pay adverse costs orders before paying his own lawyers. Such a requirement would be a gloss on the key question of whether

the imposition of a condition would stifle the defence. The question must be whether he is able to do both.

41. The evidence of loans received supports Mr Cole's submission that there have been significant difficulties in obtaining funds for the purposes of paying for the defendant's representation. I was told that if the hearing of this application were adjourned, it could not be guaranteed that funding would be available for his representation at any adjourned hearing. A CCMC hearing was adjourned in October 2022 because the defendant told the court he could not pay for representation at short notice, he then having believed until recently that it may be possible to obtain funding secured on Barkisland Hall. It may also be relevant that the claimants have recently issued a committal application against the defendant, which has yet to be listed, but at which his liberty will be at stake.

42. In my view, I should assess the statement in paragraph 38 of Woodhouse 2 against all of the above factors. I would agree with Mr O'Doherty that read in isolation that statement might support the interpretation that the defendant had not asked the relevant third parties whether they might provide funding. In light of all the evidence and, in particular, the pattern of funding that has been obtained, I am satisfied that if an unless order were made, funding to pay the costs order would probably not be forthcoming and that the order would therefore probably stifle the defence to the claim. I recognise in saying this that the claimants have a real complaint that information has emerged from the defendant later than it should have done throughout these proceedings. I do not consider, however, that these prior defaults on the part of the defendant will bear as much weight as the claimants contend they should when it comes to an assessment of the detailed evidence now before the court.

Conclusion

43. For the reasons set out above, I am satisfied on the defendant's evidence and despite the claimants' submissions that the making of an unless order would probably stifle the defendant's defence of the claim. The application is accordingly dismissed. I record my thanks to both counsel for their clear and focused submissions. This enabled the efficient disposal of this application which, as I have indicated above, could easily have been derailed.